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No. 786

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

JOHN V. KELLY, as an individual, JOHN V. KELLY, as an heir to the estate of Marjorie A. Kelly, deceased, JOHN KELLY, a minor, and DON V. KELLY, a minor, both heirs to the aforesaid estate, by and through JOHN V. KELLY, their father and next friend.

Petitioners,

vs.

CAPITAL INSURANCE & SURETY COMPANY, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

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vs.

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To the United States Court of
Appeals for the Ninth Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on the 18th day of May, 1966, and the denial of a motion for a rehearing entered on the 23rd day of June, 1966, by said court.

## OPINIONS BELOW

The opinion of the District Court of Guam is not reported, the opinion of the Court of Appeals is reported in 361 F.2d 567. Denial of petition for rehearing ------ F.2d -------.

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## JURISDICTION

The judgment of the Court of Appeals was entered on the 18th day of May, 1966. A petition for rehearing was filed on the 15th day of June, 1966, and was denied by the Court of Appeals on the 23rd day of June, 1966.

Mr. Justice Douglas extended time of petitioners until the 20th day of November, 1966. The District Court of Guam has jurisdiction under 48 U.S.C. 1424 and the Court of Appeals has jurisdiction under the provisions of

Section 1424, Title 48, USCA, Sections 1291, 1294, Title 48 USCA. The jurisdiction of this court is invoked under 28 U.S.C., Section 1252(1)..

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## QUESTIONS PRESENTED

This case presents the question as to whether or not under the direct action statute of the Unincorporated territory of Guam, Section 43354, Government Code of Guam, a new and independent cause of action did not arise upon the happening of the accident, which cause of action survives the death of the tort feasor since it is an independent cause of action against the insurance carrier. The District Court of Guam entered judgment for the petitioners. The Court of Appeals for the Ninth Circuit reversed,

holding that recovery cannot be had under the Guam Direct action statute and denied the petition for rehearing, which pointed out that this statute had been adopted from the Louisiana statute. That the Louisiana Courts, and other courts have held, that such independent cause of action did exist. Petitioners believe the sole issue in this case was whether or not an independent cause of action was created by statute at the instant of the accident. The amount of damages is not in question. That the negligence of the deceased insured was the cause of the accident upon which the action was based, was stipulated.

Petitioners believe that the Court of Appeals misconstrued the meaning of the Guam direct act statute

as adopted from the State of Louisiana and that the Court of Appeals' decision is in conflict with Louisiana decisions, and with the Fifth and other circuits, as well as with decisions of this court. Petitioners further contend that the decision of the District Court of Guam was correct.

## STATEMENT OF THE CASE

On the evening of the 24th of October, 1964, Dale S. Jones, Jr., was involved in an accident on Guam. Jones was insured by the Capital Insurance & Surety Company, Inc., The other car owned by John V. Kelly who with his wife was in the car. As a result of the accident Jones died shortly thereafter and Mrs. Kelly a day or so later. The Kellys had two children.

At the pretrial conference it was stipulated that Jones was negligent and that the accident was the result of his negligence, likewise the damages suffered by the parties plaintiffs were also stipulated. In view of the stipulations of the parties there remains but one question in the case, namely, did the cause of action survive the death of Jones. This is the one point that will be raised in this petition. Though a judgment was entered in the District Court of Guam in favor of petitioners, this judgment was reversed by the United States Court of Appeals for the Ninth Circuit and a rehearing was denied.

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## REASONS FOR GRANTING THE WRIT

It is conceded that the pleadings

and the trial record up to and including the briefs on appeal appeared to miss the major point in this case. Yet, it was, we submit, fully apparent in the record. The point is that the purpose of this statute, adopted from the Codes of Louisiana, was to preserve to persons injured, their right of action against an insurance company even in the event that the defendant or tort feasor was dead or could not be found. This is clear from the wording of the statute and is made far clearer by the cases interpreting the Louisiana statute.

The only point to be considered in this case in the District Court was whether or not the insurance carrier of the deceased tort feasor was liable. This point has been

beclouded throughout the record; due to the fact that the damages were stipulated as well as the negligence of the tort feasor, yet the District Court of Guam was correct.

The instant statute copied from the Code of Louisiana, we believe, creates a separate and distinct cause of action or claim against the insurance company. One arising at the instant of the accident. We believe that this is not abated by the subsequent death of the tort feasor but is and was vested at the instant of the accident. Despite a statement that the tort feasor, Jones, died at the scene of the accident. We believe that the statute was adopted as interpreted by the Courts of Louisiana.

We believe also that the technical

defenses peculiar to the insured cannot be plead and are not available to his insurance carrier. The insurance carrier is in the business of accepting risks of this nature.

We submit in the instant case that the Louisiana statute and decisions would hold the insurance carrier liable. We believe that the Court of Appeals was led astray by the contention that the petitioners did not place themselves within the provisions of the policy. If Jones had lived, he would have been liable. Jones did live until this right of action arose. Therefore, by contract, his insurance carrier should, we believe, be liable.

Several cases have been found construing this statute and other cases we believe are of importance in

applying the correct principles of law. It needs but little authority to show that a remedial statute should be liberally construed, Brill v. Jewett et al, 262 F. 935. Another case in point is Pennsylvania Casualty Company et al vs. Phoenix, 139 F.2d 893, holding that the rights of the party are to be determined at the instant of the accident.

We believe that this being a direct action statute the liability of the insurer would, of course, depend upon the liability of the insured at the instant of the accident. This liability has been stipulated. We believe that a good guide is Delegos v. Fidelity & Casualty Company of New York, 313 F.2d 809. The shortness of the insured's life after the impact

is, we believe, immaterial.

There is no question but the Guam statute, as well as similar statutes are valid and constitutionality as has been determined by this court with respect to the Louisiana statutes in Watson v. Employers Liability Assur. Corp., 348 US 66, 99 L.Ed. 74, 75 S.Ct. 166.

As this court held in its construction of the Louisiana statute in the case of Lumbermen's Mutual Casualty Company, petitioner, v. Florence Elbert, 348 US 48, 99 L.Ed. 59, 75 S.Ct. 151. The insurance company is not a nominal defendant but is the real defendant and is liable. The parties could sue the insurance company without joining Jones, even if Jones had lived. We submit that

because of the problems herein certiorari should be granted. There was many difficulties in the resolution of this case, but nevertheless in view of the conflict between the Ninth Circuit and other circuits and the Courts of Louisiana, not to speak of the conflict in construction of this particular statute with this court, we submit that certiorari should be granted.

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## CONCLUSION

In conclusion we respectfully submit that this petition for certiorari should be granted.

Respectfully submitted,

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# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CAPITAL INSURANCE & SURETY CO., INC.,
*Appellant,*

vs.

JOHN V. KELLY as an individual, JOHN V. KELLY as an heir to the estate of Marjorie A. Kelly, Deceased, JOHN KELLY, a minor, and DON V. KELLY, a minor, both heirs to the aforesaid estate, by and through JOHN V. KELLY, their father and next friend,
*Appellees.*

No. 20,302

[May 18, 1966]

Appeal from the United States District Court
Territory of Guam

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Before: HAMLEY, JERTBERG, and ELY, Circuit Judges

ELY, Circuit Judge:

This appeal presents the question of whether, in the Territory of Guam, a claim which arises from the negligent operation of a motor vehicle and which has permanently abated as against the tortfeasor because of his death may be successfully prosecuted against his automobile insurer under a Guamanian statute permitting such insurers to be sued directly.

The appellant is an insurance company which, on October 24, 1964, carried a policy which was written in terms of indemnification and ran in favor of Dale S. Jones. The policy generally covered the operation of an automobile which, on the mentioned date, was involved in a collision with another vehicle. Jones was the driver and sole occupant of the insured vehicle, and he sus-

tained injuries from which he died at the scene of the accident. In the other automobile were the appellee and his wife. Both were injured, the wife so seriously that she did not survive.

The appellee instituted suit for the recovery of damages resulting to him from his wife's death and from his own personal injuries. The suit was brought against the appealing insurance company. Its liability was claimed to rest upon Section 43354 of the Guam Insurance Code, which reads as follows:

> "Liability policy: direct action. On any policy of liability insurance the injured person or his heirs or representatives shall have a right of direct action against the insurer within the terms and limits of the policy, whether or not the policy of insurance sued upon was written or delivered in Guam, and whether or not such policy contains a provision forbidding such direct action, provided that the cause of action arose in Guam. Such action may be brought against the insurer alone, or against both the insured and insurer."

The appellant agreed, by stipulation, that its insured had been solely responsible for the accident, and both parties agreed that, should liability be determined, damages should be fixed in the amount of $14,000. Appellant defended itself upon the sole ground that the cause of action abated upon the death of the insured. The defense was rejected, and the District Court entered judgment in which appellee was awarded damages for the agreed amount.

The appellee does not dispute the proposition that, under the law of Guam, a tort action abates upon the death of the tort-feasor.[1] He urges, however, that the statute which we have quoted,

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[1]In its written opinion, the District Court observed,

"The Guam Codes were originally adopted from California in 1933, at which time the California courts had held that torts of this kind did not survive the death of the tort-feasor. When Guam took the California Codes it took the construction placed upon such Codes by the California courts, United States v. Johnson, 181 F.2d 577. McLellan v. Automobile Ins. Co. Of Hartford, Conn., 80 F.2d 344 (9 Cir. 1935) was a case which arose in Arizona but so many Cali-

considered in the light of Guam's Financial Responsibility Law, should lead us to an exceptional ruling in the case at bar. He points to one section[2] of the Financial Responsibility Law, which does not require that automobile owners insure the operation of their vehicles but merely affects the driving privilege of one who may be unable to demonstrate a limited financial responsibility following an accident in which his vehicle is involved.

Appellee cites no case which stands for the proposition successfully advanced to the court below. He grounds his contention upon considerations of public policy, urging that the cited statutes evidence a legislative intent that the insurer of an automobile operating upon the highways of Guam shall remain liable to the victims of its insured's negligence, even though the insured shall have died before the responsibility is established.

It is not our function, in a case such as this, to establish a policy which is claimed to be in the interest of the people of Guam. The policy, good or bad, is already fixed by the action or inaction of the legislative bodies properly empowered to enact

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fornia cases are cited as to make it abundantly clear that survival did not exist. The plaintiffs herein do not contend to the contrary."

In 1946, the California Supreme Court held that an action, insofar as it pertained to attempted recovery for property damage, did not abate with the death of the tortfeasor. *Hunt v. Authier*, 28 Cal. 2d 286, 169 P.2d 913 (1946). The decision was widely criticized as being an unwarranted court usurpation of the legislative function. See, *e.g.*, 26 Neb. L. Rev. 128 (1946); 21 St. John's L. Rev. 111; 20 So. Cal. L. Rev. 239 (1947). In 1949, the California legislature enacted legislation specifically permitting causes of action involving physical injury to survive the death of the tortfeasor. Cal. Civ. Code § 956.

[2]"Insurance (a) No policy or bond shall be effective under Section 23628 unless issued by an insurance company or surety company authorized to do business in Guam, nor unless such policy or bond is subject, if the accident has resulted in bodily injury or death, to limits, exclusive of interest and costs, of not less than Five Thousand Dollars ($5,000.00) because of bodily injury to or death of one person in any one accident and Ten Thousand Dollars ($10,000.00) because of bodily injury to or death of two or more persons in any one accident, and Five Thousand Dollars ($5,000.00) because of injury to or destruction of property of others in any one accident." Guam Vehicle Code § 23629(a).

measures reflecting the will of their constituencies. Here, the legislature has decreed that a victim ". . . shall have a right of direct action against the insurer *within the terms and limits of the policy* . . . ." (Emphasis added.) The insurance contract under consideration provided that the appellant would "indemnify the insured for all sums which *he* shall become legally obligated to pay as damage because of bodily injury, including death at any time resulting therefrom . . . ." (Emphasis added.)

The deceased insured did not "become legally obligated to pay" any damages whatsoever, nor could he or his estate be held to become so obligated under the admitted state of Guamanian law.

There was a strongly valid reason for Guam's action in authorizing a direct proceeding against the insurer of an automobile operating upon Guam's roadways. It is well known that the population of the Territory, military personnel and others, has been unusually transient in its nature. Obviously, it was believed that an insurer of an automobile should not escape a just obligation because of the removal of its insured from the Territory and the consequent difficulty or impossibility of subjecting the insured himself to the jurisdiction, *in personam*, of the courts of Guam. It is hardly to be questioned, however, that the legislature contemplated that an insurer, sued in a direct action, might encounter no insurmountable obstacle in presenting its insured's testimony, either in deposition form or by production of the witness personally.

In analyzing the case at hand, different considerations of policy are apparent. An alleged tortfeasor who is deceased may have been the only witness to events which might fairly exculpate him from legal responsibility. The rule that a tort action against him abates with his death was predicated upon the belief that public policy would be best served by avoiding the possibility that heirs suffer injustice because death foreclosed the opportunity for successful defense.

In this case, we cannot undertake to weigh conflicting considerations of public policy. We are not properly empowered to supply additions to an insurance contract, and we cannot enlarge statutory provisions and extend them beyond the limit of such legislative objectives as may reasonably be inferred from the provisions themselves.

*Wiechmann v. Huber*, 211 Wis. 333, 248 N.W. 112 (1933), is a case which appears to be close in point. It arose from an automobile accident which occurred in Wisconsin after that State had adopted its second automobile financial responsibility law in 1931. See Feinsinger, *Financial Responsibility Laws and Compulsory Insurance*, 10 Wis. L. Rev. 192, 196-99 (1935). A tort action against an insured defendant abated because of the insured's death. A Wisconsin statute made provision for direct action against an insurer, but the court held that the insurer was no longer liable. Referring to the decision, the Supreme Court of Wisconsin has subsequently written,

> "In Wiechmann v. Huber, . . . , the assured died before action was begun by the representative of the deceased party, and the action for wrongful death abated thereby. It was held to be 'quite impossible to read into the statutes an intent to create a liability on the part of the insurance carrier completely dissociated from the liability of the insured,' and plaintiff could not recover from the insurer."

*Segall v. Ohio Cas. Co.*, 224 Wis. 316, 272 N.W. 665, 667 (1937).

The opinion in *Wiechmann* was again quoted, with apparent approval, by Wisconsin's Supreme Court in *Kujawa v. American Indem. Co.*, 245 Wis. 361, 14 N.W.2d 31, 33 (1944).

Louisiana also has a statute providing that an insurer may be sued directly for alleged torts committed by the insured. To support its decision, the court below relied upon two Louisiana cases, *McHenry v. American Employers Ins. Co.*, 18 So. 2d 840 (La. Ct. App. 1944) and *Rome v. London & Lancashire Indem. Co.*, 169 So. 132 (La. Ct. App. 1936). In one of these cases it was held that the doctrine of sovereign immunity, operating to prevent suit against an insured, would not extend to protect the insurer also. In the other it was held that the doctrine of interspousal tort immunity would not prevent a husband's suit against his wife's insurance carrier for the wife's negligence while operating the insured vehicle as an employee for another. Each of these cases involved absolute defenses available to alleged tortfeasors because of established policies of the forum. The insurers were not given the benefit of their insured's immunities, because to

do so would not further the purposes of the policies underlying the immunities.[3]

In our case it would not have been necessary that any defense whatsoever be interposed in behalf of the deceased had he been named as a defendant. His death made it impossible for an effective judgment to be rendered against him. Here the same policy considerations which support the rule that a tort claim abates upon the death of the alleged tortfeasor may have influenced legislative failure to provide for survival of a cause of action, at least to the extent that there might be recovery of the contractually limited amount of possible liability of the deceased's insurer.

In *Sumait v. Capital Fire & Cas. Co.*, 296 F.2d 108 (9th Cir. 1961), our court held, in a case arising in Guam, that a plaintiff who sued an insurance carrier must bring himself "'within the terms and limits of the policy.'" *Ibid.* Since the plaintiff in that case failed to establish that the insured was liable to him, it was held that there was no liability on the part of the insurer.

The cause is remanded with directions to vacate the judgment and dismiss the action.

Reversed.

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[3]There seems to be uncertainty in the interpretation of the Louisiana statute. Concerning it, one authority writes,

> "The direct action statute does not create an absolute liability on the part of the insurer nor does it create any tort liability where none existed before. Accordingly, a direct action statute does not create a right of action where no liability otherwise existed under the contract of insurance."

12 Couch, Insurance § 45:789, p. 685 (2d ed. 1964). (Citations omitted.)

The Fifth Circuit, in *Degelos v. Fidelity & Cas. Co.*, 313 F.2d 809 (1963), interpreted the Louisiana statute as meaning,

> "Under the Direct Action Statute, the case may proceed against the insurer, but liability depends on legal liability of the assured. Whether, as the Act permits, the assured is joined with the insurer, the standard for recovery is identical." 313 F.2d at 815.

We find some difficulty in reconciling the language of Couch and the Fifth Circuit with the cited opinions of the Louisiana court.

## APPENDIX B

Government Code of Guam Section 43354

**Liability policy; direct action.** On any policy of liability insurance the injured person or his heirs or representatives shall have a right of direct action against the insurer within the terms and limits of the policy, whether or not the policy of insurance sued upon was written or delivered in Guam, and whether or not such policy contains a provision forbidding such direct action, provided that the cause of action arose in Guam. Such action may be brought against the insurer alone, or against both the insured and insurer.